



ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

August 22, 2014

Alice Edwards, Director
Division of Air Quality
Department of Environmental Conservation
410 Willoughby Avenue, Suite 303
P.O. Box 111800
Juneau, AK 99811-1800
E: Alice.Edwards@alaska.gov

Submitted via electronic mail

Re: Informal review of decision to issue Air Quality Control Minor Permit
AQ1227MSS04 to Usibelli Coal Mine, Inc. for the Wishbone Hill Coal Mining and
Processing Operation

Dear Director Edwards:

Thank you for granting Chickaloon Village Traditional Council's (CVTC's) request for informal review of the Air Quality Control Minor Permit AQ1227MSS04 (Permit). We welcome your interest and close attention to the issues raised in CVTC's request. In response to your request for additional information pertaining to the informal review, Earthjustice submits the following information on behalf of CVTC, the governing body of the federally-recognized Chickaloon Native Village (CNV or the Tribe), with all of the inherent powers of a sovereign Ahtna Athabascan Nation.

Your requests seek additional information about the ambient air boundary delineated for the Permit, which purports to remove certain large areas from Clean Air Act protection based on representations by Usibelli Coal Mine, Inc. (Usibelli) that Tribal citizens and other community members will not have access to those areas. As noted in CVTC's request for review, CVTC has two primary concerns related to access: first, that Tribal citizens will be denied access to areas used for critical cultural and spiritual activities; and second, that the Permit improperly delineates an ambient air quality boundary because Usibelli lacks legal authority to preclude public access and there are no physical barriers sufficient to keep members of the public out of the area. Because the Tribe requires access to the area to conduct these important activities, and because public access is not effectively precluded, the Department of Environmental Conservation (DEC) should not have exempted the air within the ambient air quality boundary from regulation under the Clean Air Act.

As to CVTC's first concern about its citizens' use of the area for critical cultural and spiritual activities, you requested descriptions of the areas used to conduct spiritual and cultural activities, the access routes, and examples of prior use. Ahtna Hw'taena' (Peoples) have occupied and utilized this area for a variety of subsistence, educational, cultural, and spiritual practices for thousands of years. Because this letter is a public document, and because of the sacred nature of these activities critical to the health of our peoples, CVTC is unwilling to share the requested details in this letter.¹ In order to respond to your inquiry, CVTC requests a formal, in-person consultation with you to discuss the Tribe's relationship to this area in greater detail, and is prepared to present relevant maps and photographs of the area at that meeting.²

With respect to the use of the area by other members of the public generally for other activities, you requested descriptions of the area where community members are likely to be, their access routes, and specific examples of prior use. CVTC is not in the position to interview the public concerning their use of the area, and can only speak about Tribal citizens' existing knowledge on this subject. CNV citizens and the Peace Officers of CNV's Justice Department have seen substantial off-trail all-terrain vehicle (ATV) use as well as many hunters in the area. Tribal citizens have also observed damage to vegetation and terrain that indicates the use of ATVs off-road and off-trail. The Tribe does not wish to identify publicly the exact location of off-trail ATV use because CVTC hopes that the off-trail routes will be allowed to revegetate. CVTC is concerned that if all of the routes are made known, then additional ATV use of those routes will occur and permanent trails will be established. CVTC respectfully suggests that Usibelli be required to provide more information or otherwise account for ATV users and hunters in the area.

You also requested "photographs and other evidence . . . showing the vegetation, topography, and other natural conditions in the area of the eastern side of the permit's ambient air quality boundary." While we appreciate your effort to characterize the conditions on the eastern side of the proposed mine, this information should have been provided by Usibelli in the first instance and no air permit should have been issued without substantiation that the ambient air boundary meets Clean Air Act requirements for excluding areas from the "ambient

¹ CVTC's concerns with respect to the disclosure of sensitive information have been acknowledged and incorporated into the Environmental Protection Agency Region 10's Tribal Consultation and Coordination Procedures. See EPA Region 10 Tribal Consultation and Coordination Procedures, EPA 910-K-12-002 (Oct. 2012), at 14-15, *available at* http://www.epa.gov/region10/pdf/tribal/consultation/r10_tribal_consultation_and_coordination_procedures.pdf (addressing sensitive information and record-keeping). CVTC encourages DEC to follow similar procedures.

² It is the policy of the State of Alaska "to work on a government-to-government basis with Alaska's sovereign Tribes." State of Alaska Administrative Order No. 186 (Sept. 29, 2000). As noted in CVTC's request for informal review, DEC has not yet consulted with CVTC to ensure consideration of the Tribe's interests in lands, water, air, and biological and cultural resources in the Wishbone Hill air permitting process, despite multiple requests for consultation.

air.” A permittee like Usibelli must do more than suggest or presume that public access will be precluded; rather, all outdoor air is considered ambient air and subject to regulation under the Clean Air Act unless the permittee can demonstrate affirmatively that it owns or controls the land and that public access to the land is precluded by a fence or other physical barriers.³ Stated differently, it is inappropriate to place the burden of proving public accessibility on members of the public. If DEC has any question as to whether public access is effectively precluded, it should investigate further or reject the request for an exemption from ambient air.

Although the burden of substantiating an ambient air boundary rests solely with Usibelli, CVTC is very interested in protecting the health and welfare of its community and knows the area very well, and for these reasons CVTC has compiled photographs of the area, including the eastern boundary, which depict the area’s vegetation and natural features. Although taken during the summer, when vegetation is much denser than in other seasons, these photographs demonstrate that the patches of devil’s club are not substantial enough to render the area impassable, particularly in light of the aforementioned ATV trails which riddle the area, and are unlikely to preclude physical access by the public. CVTC is willing to share these photographs with you in a formal consultation, in order to protect the sensitive nature of sacred sites that may be depicted in some photographs.

As to the topography of the eastern boundary, CVTC has already adequately described the elevation changes as depicted in the draft Permit. *See* Comment Letter at 15, 16-17; Request for Informal Review at 8-9. Specifically, CVTC noted that

Not including the access road, the first phase of the mine ranges in elevation from just under 260 to 300 meters, a difference of 40 meters (approximately 130 feet).⁴ The second phase includes elevations of 340 meters to about 420 meters in the far northeast corner, representing a difference in elevation of 80 to 160 meters from the lowest point in the mine area (approximately 260-525 feet).⁵ . . . Wishbone Hill slopes upward towards the north in a manner fairly uniform with the surrounding area, meaning that someone approaching from the east or in the southwest corner would experience little or no change in elevation.⁶

Comment Letter at 17. The topography changes are also depicted in the photographs in CVTC’s possession. These elevation changes do not appear sufficient to preclude public access, and

³ *See* Letter from Douglas M. Costle, EPA, to Hon. Jennings Randolph (Dec. 19, 1980) (“Costle Letter”), attached as Ex. 12 to CVTC’s comment letter.

⁴ Usibelli Permit Application, Dispersion Modeling, at 18 Fig. 1.

⁵ *Id.*

⁶ *See id.*

have not been sufficient in the past, as evidenced by the public's use of the area for riding ATVs and hunting.

Thank you for your attention to this important matter. Please do not hesitate to contact me or Lisa Wade, Director of CVTC's Health and Social Services Department, if you have any additional questions or to schedule the consultation.

Respectfully submitted,



Madeline Gallo

Colin O'Brien

Earthjustice

Counsel for Chickaloon Village Traditional Council

Cc: President Barack Obama
Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples
Sally Jewell, Secretary, Department of the Interior
Dennis McLerran, Regional Administrator, Environmental Protection Agency Region 10
Mark Begich, U.S. Senator
Lisa Murkowski, U.S. Senator
Don Young, U.S. Congressman
Sean Parnell, Governor, State of Alaska
Mead Treadwell, Lieutenant Governor, State of Alaska